IN THE

Supreme Court of the United States

October Term, 1946

No.....

GORDON M. MATHER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case involves the taxation of trust income for the years 1940 and 1941. The issue is whether certain trusts created by petitioner are revocable—in which case

the income is taxable to petitioner under Section 166 of the Internal Revenue Code—or irrevocable, in which case the income is not taxable to petitioner under Section 166.

1. Facts

There are no disputed facts. The case was submitted to the Tax Court upon a stipulation of facts (R. 27-30). Briefly, these are as follows:

The Trust Agreements

Shortly following the respective births of four of his children petitioner created a trust for each of them. These trusts are identical in their provisions with the exception of the date of execution and the name of the beneficiary. The Toledo Trust Company (successor to The Summit Trust Company, named as Trustee in each agreement) is now the Trustee. The designation of each trust on the Trustee's records, the name and birth date of the beneficiary and the respective dates of execution of the trusts are as follows:

Designation Of Trust	Name of Beneficiary	Date of Birth of Beneficiary	Date of Execution of Trust Indenture
Mather Trust #36	Rathbun F. Mather	Jan. 15, 1920	June 15, 1922
Mather Trust #37	George Mather	July 7, 1921	June 15, 1922
Mather Trust #49	Adele Mather	May 7, 1923	Dec. 31, 1923
Mather Trust #131	Catherine Mather	Nov. 27, 1924	July 1, 1925

A copy of one of the trust agreements is attached to the stipulation (R. 30-40). The beneficiary provisions of the trusts are set forth in Article I, Section 6 of each trust (R. 33-36). The trust is a long-term trust. An individual child is named as the beneficiary of each trust and the principal is distributable to such child at the ages

of thirty, thirty-five and forty (subject to the Trustee's right to withhold the final distribution for a longer period). Should the beneficiary die, the trust property is to be held for the beneficiary's issue, or if none, then it is to be distributed to the Donor's other children or their issue. Income is distributable to the beneficiary after attaining the age of twenty-five, subject to distribution prior thereto for the maintenance and education of the beneficiary "should same become burdensome to Donor." It is a stipulated fact, however, that the maintenance and education of his children has never become burdensome to petitioner (Par. 7 of Stipulation of Facts, R. 28); and it is a further stipulated fact that none of the trust income was distributed during the years 1940 and 1941 here in question (Par. 4 of Stipulation of Facts, R. 28).

The principal question in this case arises in connection with certain rights of petitioner, as grantor, with respect to administrative control over investment of the trust property. Full administrative control of the trust property is vested in the independent corporate Trustee, subject only to petitioner's right, if he so desires, to direct investments. Thus, it is provided in Section 1, Article I of the trust that the Trustee may invest in

> "* * * such securities as Trust Companies are now empowered by the laws of the State of Ohio to invest trust funds, or in such securities as the Donor may direct in writing." (R. 31);

while in Section 4, Article V, it is provided that:

> "The Trustee is authorized and directed to make all loans, sales, and purchases which Donor may hereafter direct in writing." (R. 39.)

Trust Income and Assessment of Income Tax

On April 25, 1944, the Commissioner sent petitioner a notice of deficiency (R. 8-13) recomputing petitioner's gross income for the years 1940 and 1941 by including therein all of the income of the four trusts and assessing deficiencies for those years in accordance with such recomputation. On July 22, 1944, petitioner filed his petition with the Tax Court requesting a redetermination of such deficiencies and a finding that none of such trust income should be taxable to him as grantor.

At the time of assessing the deficiency the Commissioner claimed that the trust income was taxable to petitioner under Sections 22(a) and 167 of the Internal Revenue Code. (See "Explanation of Adjustments" attached to deficiency notice, R. 10, 12.) Subsequently, in his brief before the Tax Court, the Commissioner added a third section upon which he relied, namely, Section 166.

2. Opinions of the Courts Below

The Tax Court, in its opinion promulgated on October 30, 1945 (R. 15-23), sustained the assessment of the deficiency by the Commissioner. However, in doing so, the Tax Court relied solely on the provisions of Section 166. The Tax Court did not mention Section 22(a) other than to note that the Commissioner had asserted its applicability. As to Section 167, the Tax Court merely expressed a doubt as to whether or not the income was taxable to petitioner under the provisions of that section.

The opinion of the Tax Court is based solely upon its conclusion that the trust income is taxable to the petitioner under the provisions of Section 166. This is apparent from the following statement in its opinion:

"But even if Section 167 is not applicable on the facts, we think that the income of the trusts must be held taxable to petitioner under Section 166 because of petitioner's retention of the right to require the trustee to make loans, sales, and purchases such as he might direct in writing. That provision of the trust agreements is also without any qualification. Petitioner was under no fiduciary obligation to use the rights to the best interests of the beneficiaries. For all that the trust agreements show, and we have no other evidence before us, he could have required the trustee to sell the trust assets or lend the trust funds to himself upon any terms that he might have named. Such rights have been held to be tantamount to a power to revoke the trust. *Estate of William J. Garland*, 42 B. T. A. 324 (supplemented 43 B. T. A. 731); *Percy M. Chandler*, 41 B. T. A. 165, affd. 119 Fed. (2d) 623; *Charles T. Fisher*, 28 B. T. A. 1164." (R. 22.)

Pursuant to its opinion, the decision of the Tax Court was entered December 29, 1945 (R. 25).

On Appeal, the Circuit Court of Appeals for the Sixth Circuit, without opinion, affirmed the decision of the Tax Court "upon the grounds and for the reasons stated in its opinion * * *." The decision of the Court of Appeals was entered October 17, 1946 (R. 51).

3. Statute Involved

The only statute involved is that under which the courts below held the trust income to be taxable to petitioner, namely, Section 166 of the Internal Revenue Code. The section applies only to revocable trusts and provides that the income of such trusts is taxable to the grantor.

"Sec. 166. REVOCABLE TRUSTS.

"Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor."

II

JURISDICTION

1. The date of the judgment to be reviewed is October 17, 1946 (R. 51).

2. The statutory provision which is believed to sustain the jurisdiction of this court is Judicial Code, Section 240, as amended by the Act of February 13, 1925, C. 229, Sec. 1 (43 Stat. 938, 28 U. S. C. A. Sec. 347).

III

THE QUESTION PRESENTED

The sole basis for the Tax Court's decision was its conclusion that the petitioner's right to direct trust investments, that is, purchases, sales and loans, amounted in substance to a power to revoke and that, consequently, the trust income was taxable to petitioner under Section 166 of the Internal Revenue Code. The Court of Appeals adopted this as the basis for its judgment of affirmance. The single question presented for review, therefore, is this:

> Does the retention, by the donor of a trust, of the right to direct the trustee in the making of loans, sales and purchases, constitute a power of revocation of the trust by virtue of which title to the corpus of the trusts may be revested in the donor, so that the income is taxable to the donor under Section 166 of the Internal Revenue Code?

IV

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals for the Sixth Circuit has decided a federal question in a way probably in conflict with applicable decisions of this court.

In applying federal tax statutes to trusts wherein the grantor of the trust retained control over trust investments, this court has held that the reservation of such control does not make the trust revocable within the meaning of those sections of the Internal Revenue Code taxing revocable trusts.

Helvering vs. Stuart, 317 U. S. 154;
Reinecke vs. Northern Trust Co., 278 U. S. 339.

The decision holding the trusts here in question to be revocable is apparently in direct conflict with the decisions of this court.

2. The Circuit Court of Appeals for the Sixth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions.

Insofar as the question of the right to use a power over trust property for personal aggrandizement or benefit is one involving property rights subject to local decisions, it is clear that fundamental equitable principles of trust law, as applied by the courts of Ohio and of every other state, would prevent the use of the power here in question for the purpose of revoking the trust and retaking the trust corpus.

Shank vs. DeWitt, 44 O. S. 237, 6 N. E. 235;
Carrier vs. Carrier, 226 N. Y. 114, 123 N. E. 135.

Wherefore, it is respectfully submitted that this petition for writ of *certiorari* to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.

DONALD F. MELHORN,
Counsel for Petitioner.

GEORGE F. MEDILL,
Of Counsel.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1946

No.....

GORDON M. MATHER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

I

OPINIONS OF THE COURTS BELOW

The opinion of the Tax Court was promulgated October 30, 1945, and is officially reported at 5 T. C. 1001.

The Circuit Court of Appeals for the Sixth Circuit did not deliver an opinion. Its order of affirmance has not been officially reported.

II

JURISDICTION

The grounds on which the jurisdiction of this court is invoked have been set forth in the foregoing petition.

III.

STATEMENT OF THE CASE

The essential facts of the case are fully stated in the foregoing petition and in the interest of brevity are not repeated here.

IV

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In affirming the decision of the Tax Court that the income of trusts wherein petitioner reserved the right to direct investments is taxable to petitioner under the provisions of Section 166 of the Internal Revenue Code on the grounds and for the reason that such reserved right is tantamount to a power to revoke.

V

ARGUMENT

Summary of Argument

The right to direct investments is not and never has been recognized as a power which may be used directly or indirectly by the holder thereof, including the grantor, for the purpose of personal gain or benefit.

A. As a matter of property rights subject to local law, the grantor of a trust may not use a reserved right to direct investments for the purpose of revoking the trust. A completed gift in trust cannot be revoked unless the power to revoke is expressly reserved. The right to direct investments is nothing more nor less than control over the administration of the trust and is neither an express nor an implied power to change, alter, amend or revoke property rights in the trust corpus.

B. The foregoing principles applicable in local jurisdictions to questions of property rights are likewise applicable and have been applied to the determination of federal tax questions.

Point A

As a Matter of Fundamental Equitable Principles, the Reserved Right to Direct Trust Investments May Not Be Used for the Purpose of Revoking the Trust.

Section 166 of the Internal Revenue Code makes taxable to the grantor the income of any trust wherein he reserves the power to "revoke," that is, take back and retain as his own the property he has given to the trustee. Insofar as applicable to this case, it provides:

> "Sec. 166. Revocable Trusts. Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested * * * (1) in the grantor * * * then the income of such part of the trust shall be included in computing the net income of the grantor."

The sole question in this case, therefore, is whether the provision in the trust agreement that

> "The trustee is authorized and directed to make all loans, sales, and purchases which donor may hereafter direct in writing"

gives the petitioner the right and power to revoke the trust.

It is fundamental trust law that where the complete trust agreement is set forth in writing, there is no implied power ot revoke a trust—in the absence of fraud or mistake, the grantor can revoke only if and to the extent that he has expressly and clearly reserved such right.

> 40 *Ohio Jurisprudence,* p. 561;
> Bogert, *Trusts and Trustees,* Section 993;
> *Restatement of the Law of Trusts,* Section 330.

The question is simply whether or not the right to control the *administration* of the trust—in this case by directing investments—can in any way be regarded as a right to control the *beneficial property interests* under the trusts.

The two rights are entirely unconnected. The right to direct investments is not a right to change, alter or revoke beneficial rights even by remote inference. It would seem clear, therefore, that the grantor would not be permitted to accomplish an indirect revocation when it is apparent that he could not do so directly.

It may be conceded that if the grantor reserves a right to buy or borrow the trust assets for his own benefit and on his own terms he has effectually reserved a right to revoke. But such a right cannot be implied—such a right is never recognized unless clearly set forth in language that cannot be misunderstood. Administrative control cannot be turned into a right to retake or recapture trust property unless the right is expressly reserved. In other words, if we regard the grantor as the holder of a power over trust property it is clear he cannot exercise the power for his own benefit unless specifically authorized to do so by the terms of the trust. As stated by the Supreme Court of Ohio in *Shank vs. DeWitt*, 44 O. S. 237, 6 N. E. 235:

> "'A power cannot be executed in favor of the donee of the power unless the instrument specially authorizes him to do so. The donee of a power cannot execute it for any pecuniary gain, directly or indirectly, to himself.' 2 Perry on Trusts, Section 511."

The equitable principle governing the use of a reserved power to direct investments was set forth by Judge Cardozo while a member of the New York Court of Appeals. In the case of *Carrier vs. Carrier*, 226 N. Y. 114, 123 N. E. 135, the grantor retained the "absolute and uncontrolled" right to direct investments. After threats by the grantor to loan the funds to himself and otherwise take advantage of his power, the lower court issued an injunction placing restrictions upon the exercise of the grantor's power and in upholding this action Cardozo said:

"It is true that the creator of this trust had reserved to himself the broadest rights of management. His discretion was to be 'absolute and uncontrolled.' That does not mean, however, that it might be recklessly or willfully abused. He had made himself a trustee, and in so doing he had subjected himself to those obligations of fidelity and diligence that attach to the office of trustee. He had power to 'invest' the moneys committed to his care. He had no power, under cover of an investment, to loan them to himself. His discretion, however broad, did not relieve him from obedience to the great principles of equity which are the life of every trust."

Point B

The Principles Are Applicable in Determining Federal Tax Questions

The foregoing equitable principles which have been applied to the settlement of rights and interests among the parties themselves have also been applied by this court in determining questions of taxation.

This court has held directly that the retention of administrative powers, including complete control over investments, does not constitute a power of revocation. In *Reinecke vs Northern Trust Co.*, 278 U. S. 339, the grantor "reserved to himself power to supervise the reinvestment of trust funds, to require the trustee to excute proxies to his nominee, to vote any shares of stock held by the trustee, to control all leases executed by the trustee, and to appoint successor trustees." The question was whether or not the trust corpus was subject to estate tax as a part of the grantor's estate on the ground that the reserved powers made the trust revocable. This court, in holding that these reserved powers of management did not make the trust revocable, said, at page 346:

> "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased. * * *"

The case of *Helvering vs. Stuart*, 317 U. S. 154, directly involved the question of the taxation of trust income to the donor of a trust containing reserved powers of management. The trust provided that:

> "'Eighth. The Donor reserves and shall have the right at any time and from time to time to direct the Trustees to sell the whole of the Trust Fund, or any part thereof, and to reinvest the proceeds in such other property as the Donor shall direct. * * *'"

Notwithstanding this reserved power, the income of the trust was held not taxable to the donor under Section 166.

The error into which the Tax Court fell is immediately apparent from an examination of the three cases* cited and relied on in its opinion. In all three cases the grantor had expressly reserved the right to use his powers for his own benefit. For example, in the *Chandler case* the agreement expressly provided that the trustee,

> "shall make such sale * * * either to Grantor or to a third party * * * of all or any part of the Trust Fund and for such considerations and upon such terms as to credit or otherwise as Grantor may direct."

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* *Chandler vs. Commissioner*, 41 B. T. A. 765, affirmed, 119 F. (2d) 623 (C. C. A. 3rd, 1941); *Estate of William J. Garland*, 42 B. T. A. 324; *Charles T. Fisher*, 28 B. T. A. 1164.

The Court of Appeals in that case was particular to point out the difference between a trust in which the grantor has reserved a power with the expressed right to use it for his own benefit and one in which there is no such expressed right.

The Tax Court apparently proceeded on the theory that, unless *expressly prohibited,* the grantor may use his administrative control for his own benefit. The law, however, is the exact reverse—it is that, unless *expressly stated,* the grantor cannot use such power for his own benefit. In other words, silence is tantamount to a prohibition against using the power for personal gain or benefit.

With respect to the question of taxation of the trusts under Sections 22(a) and 167, that question was fully argued in the courts below and neither the Tax Court nor the Court of Appeals relied on those sections in determining that the income was taxable to petitioner. We may assume, therefore, that the courts below felt that the trust income was not taxable to petitioner under either of those sections. We merely point out, in passing, that under either of those sections, income is taxable to the grantor of a trust on an altogether different basis than under Section 166.

VI

CONCLUSION

We believe the foregoing illustrates that the Tax Court and Circuit Court of Appeals have rendered a judgment which is patently contrary to the trust law as applied by the Ohio courts; and which further is directly contrary to the decisions of this court.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively defined; and that the judgment of the Tax Court and of the United States Circuit Court of Appeals for the Sixth Circuit may be reversed in order that justice may be done to petitioner; and that to such end a writ of *certiorari* should be granted and this court should review the decision of the United States Circuit Court of Appeals for the Sixth Circuit and finally reverse it.

DONALD F. MELHORN,
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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 852

GORDON M. MATHER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 15–23) is reported at 5 T. C. 1001. The *per curiam* order of the court below (R. 51) is reported at 157 F. 2d 680.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 17, 1946. (R. 51.) The petition for a writ of certiorari was filed on January 6, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under Section 22 (a), Section 166, or Section 167 of the Internal Revenue Code, the taxpayer was taxable on the income of four trusts he had created, each for the benefit of one of his minor children, the taxpayer under each trust having retained the right to elect at any time to have all of the income used for the maintenance and education of the children and to direct the trustee to make investments, and the trustee being required to make all loans, sales, and purchases directed by the taxpayer.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 13–16.

STATEMENT

This is a proceeding involving income tax deficiencies for the years 1940 and 1941 determined by the Commissioner (R. 8–13) against the petitioner (hereinafter referred to as the taxpayer) in the amounts of $36,939.12 and $28,237.24, respectively. After two other minor issues were eliminated (R. 41), there was left for decision by the Tax Court only the issue whether the taxpayer was taxable during the years in question on the income of four trusts he had previously

established for the benefit of four of his infant children (R. 15–16). The facts relevant to that issue, as contained in a stipulation (R. 27–30) and an exhibit attached thereto (R. 30–40), and as found by the Tax Court (R. 16–20), may be summarized as follows:

Prior to the taxable years, the taxpayer had created four separate trusts, one each for the benefit of his four minor children, with a corporate trustee.[1] The trustee was given broad administrative powers, including the power to invest and reinvest, either in legal trust investments under the laws of Ohio or "in such securities as the Donor may direct in writing". (R. 16.)

Under Section 6 of Article I of the trust (R. 33–36), after providing that the trustee should pay its compensation and carrying charges out of current income, it was provided that (R. 17):

> After making the payments set forth in the second paragraph of this section, or making provision therefor out of said income, the Trustee shall,—subject to the clause hereinafter inserted providing for the use of same for the maintenance and education of said beneficiary, should same become burdensome to Donor,—reinvest the balance of said income from time to time for the benefit of the beneficiary of

[1] The trust instruments were identical, except as to dates, property conveyed, and names of beneficiaries. (R. 16.) A copy of one of the instruments was attached as Exhibit "A" (R. 30–40) to the stipulation of facts.

> the Trust Property hereunder until the beneficiary reaches the age of twenty-five (25) years, after which time the Trustee shall pay to said beneficiary the net income from the Trust Property, said payments to be made quarterly or oftener. * * *

Then follow provisions for the distribution of the principal to the beneficiary at the ages of 30, 35 and 40, and provisions for the final disposition of the trust property in the event of the beneficiary's death before the termination of the trust. Then, in Section 6 of Article I, it is further provided that (R. 17):

> The Donor retains the right to elect at any time to have all or any part of the net income used for the maintenance and education of his said son, Rathbun Fuller Mather, or said son's lineal heirs.

In Section 4 of Article V of the instrument, it was further provided that (R. 18):

> The Trustee is authorized and directed to make all loans, sales and purchases which Donor may hereafter direct in writing.

The Tax Court found, as stipulated, that the trustee had from time to time purchased additional securities, sometimes acting under written directions of the taxpayer; that no loans have ever been made by the trustee as provided for in Section 4 or Article V, and that none of the trust properties have ever been reconveyed to the

taxpayer; that no occasion has arisen when the maintenance and education of the beneficiaries has become financially burdensome to the taxpayer; and that during the taxable years the maintenance and education of the beneficiaries were provided for by the taxpayer from his own funds at a cost of $10,147.21 in 1940 and $7,670.20 in 1941. (R. 18–19).

The taxpayer did not include any of the income of the four trusts in his income tax return for 1940, while in his return for the year 1941 he included income from the trusts to the extent of $7,670.20. Later, after an examination of his return for 1940, the taxpayer consented to the inclusion in his gross income for 1940 of income of the trusts to the extent of $10,147.21, and paid an additional tax with respect thereto in 1941. (R. 19.)[2]

Subsequently, the Commissioner determined deficiencies in income tax against the taxpayer for the two taxable years as the result of (in addition to other items not here material) the inclusion in the taxpayer's gross income of all of the income [3]

[2] The amounts of $10,147.21 and $7,670.20 are equal to the amounts expended by the taxpayer for the maintenance and education of the beneficiaries during the years 1940 and 1941, as already brought out.

[3] With respect to one of the trusts, designated as the Mather Trust #36, the income which the Commissioner added to the taxpayer's income for 1941 was the income of that trust only to January 15, 1941, the date the beneficiary became 21 years of age. (R. 28.)

of the four trusts, on the theory that the taxpayer was taxable thereon under Sections 22 (a) and 167 of the Code. (R. 8–13, 19.) In his appeal to the Tax Court, the taxpayer claimed that no part of the income of the trusts was taxable to him and that, instead of the deficiencies, his income tax for 1940 and 1941 had been overassessed in the amounts of $5,898.25 and $5,409.79, respectively. (R. 3–7.) Before the Tax Court, the Commissioner contended that the taxpayer was taxable upon the income of the four trusts under Sections 22 (a), 166 and 167 (a) of the Code. (R. 20.)

The Tax Court in its opinion approved the Commissioner's determination that the taxpayer was taxable upon all the income of the trusts (R. 20–23), and accordingly entered its decision sustaining the deficiencies (R. 24).[4] The court below affirmed the decision of the Tax Court by a *per curiam* order. (R. 51.)

ARGUMENT

The court below correctly upheld the decision of the Tax Court which sustained the Commissioner's determination that the income of these trusts was taxable to the grantor. Before

[4] The deficiency for 1941 was reduced from $28,237.24, as originally determined by the Commissioner (R. 13), to $27,719.74 by the Tax Court (R. 24), as the result of adjustments made with respect to the two minor issues eliminated from the case before the Tax Court, as already pointed out, upon concession by the Commissioner (R. 15–16, 41).

the Tax Court, taxability under Sections 22 (a), 166 and 167 (a) of the Code (Appendix, *infra*) was claimed by the Commissioner. (R. 20.) While the Tax Court did not pass upon the applicability of Section 22 (a), its opinion clearly shows that the Tax Court held the income to be taxable to the taxpayer under Section 167, and that, even if Section 167 were not applicable, the income would nevertheless be taxable to the taxpayer under Section 166. (R. 20–23.) Since the court below "affirmed upon the grounds and for the reasons stated" (R. 51) by the Tax Court in its opinion, the decision below must be regarded as having approved the taxability of the trust income to the taxpayer under Section 167, as well as under Section 166, and not merely under Section 166 alone, as the taxpayer contends (Pet. 1–2, 4–6).

1. In upholding the Commissioner's taxing of the trust income to the taxpayer, the Tax Court concluded that, because of the power reserved by the taxpayer to have all of the income of the trusts applied to the maintenance and education of his minor children-beneficiaries,[5] the income of

[5] With respect to that power, reserved (in the eighth paragraph of Section 6 of Article I (R. 35)) as the Tax Court pointed out (R. 21) "in clear and concise words", the Tax Court properly concluded that it was not subject to the alleged condition contained in a parenthetical clause (in the fourth paragraph of Section 6 of Article I (R. 34)) to the effect that the maintenance and education of the children must become burdensome to the taxpayer (R. 20).

the trust was taxable to the taxpayer under Section 167 (a) and the doctrine of *Helvering* v. *Stuart*, 317 U. S. 154. The Tax Court further concluded that the taxpayer was not relieved from taxation upon the entire trust income by Section 167 (c) of the Code, as amended by Section 134 of the Revenue Act of 1943, c. 63, 58 Stat. 21 (Appendix, *infra*). Where the discretion to apply the trust income to the maintenance and education of a beneficiary whom the grantor is legally obligated to support rests solely in the grantor, Section 167 (c) does not relieve the grantor from taxation under Section 167 (a), unless the grantor has such discretion as a trustee or a cotrustee. See H. Rep. No. 871, 78th Cong., 1st Sess., pp. 32–33 (1944 Cum. Bull. 901); S. Rep. No. 627, 78th Cong., 1st Sess., pp. 28–29, 67–70 (1944 Cum. Bull. 973); H. Conference Rep. No. 1079, 78th Cong., 2d Sess., pp. 58–59 (1944 Cum. Bull. 1059). See also Treasury Regulations 103, Section 19.167–2, as added by T. D. 5392, 1944 Cum. Bull. 328.

The conclusions of the Tax Court in this respect were unquestionably correct under the applicable statutory provisions as interpreted by this Court. Since the decision below is correct on this ground, we believe there is no warrant for review by this Court upon the basis of doubts or conflicts alleged to exist with respect to any alternative ground upon which the decision below was also founded.

2. As noted, the Tax Court also sustained the taxability of the trust income to the grantor under Section 166 of the Code, because of the taxpayer's retention of the right to require the trustee to make such loans, sales and purchases as he (the taxpayer) might direct in writing. (R. 22–23.) As the Tax Court pointed out (R. 22), the taxpayer was not under any fiduciary obligation to use his retained rights for the benefit of the beneficiaries, and he could have required the trustee to lend or sell the trust assets to him upon any terms he might have named. The retention of such rights has been consistently held, as the Tax Court stated (R. 22), to be "tantamount to a power to revoke". See *Garland* v. *Commissioner*, 42 B. T. A. 324, 328, supplemental opinion 43 B. T. A. 731, 735; *Chandler* v. *Commissioner*, 41 B. T. A. 165, 175–176, affirmed, 119 F. 2d 623, 625–626 (C. C. A. 3d); *Fisher* v. *Commissioner*, 28 B. T. A. 1164, 1168–1169; *Whiteley* v. *Commissioner*, 42 B. T. A. 316, 323. See also Treasury Regulations 103, Section 19.166–1, as amended by T. D. 5194, 1942–2 Cum. Bull. 53, and by T. D. 5392, 1944 Cum. Bull. 328, and T. D. 5488, 1946–1 Cum. Bull. 19.

As the Tax Court pointed out (R. 23), the taxpayer in this case retained rights broader than mere "control over the trust investments", and while it might be argued that the words such as "sales" and "purchases" connote transactions

for a fair consideration, no such meaning can be ascribed to the word "loans". In these circumstances, it is clear that the decision below, in so far as it sustains the conclusions of the Tax Court as to the applicability of Section 166, does not conflict, as alleged (Pet. 7), with *Helvering* v. *Stuart, supra,* and *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, holding that the retention by the grantor of a power to control trust investments does not amount to a power of revocation.

There is likewise no merit to the claim (Pet. 7) that the court below has decided a question of local law in a way probably in conflict with the applicable local decisions. This contention rests upon the premise (Pet. 7, 10, 12–13) that the grantor of a trust is a fiduciary with respect to powers which he reserves to himself and that he may not exercise such powers for his own benefit, unless specifically authorized to do so by the terms of the trust. In support thereof the taxpayer relies (Pet. 14–15) on *Chandler* v. *Commissioner, supra,* in which the Circuit Court of Appeals for the Third Circuit stated (119 F. 2d 625–626) that a reservation by the grantor of a power to direct the sale or disposition of trust assets is subject to the equitable principles regulating the conduct of fiduciaries, unless the power is expressly reserved for the benefit of the grantor. But this observation in the *Chandler* opinion was drawn from the law of New York (which was applicable to that

case), as enunciated in *Carrier* v. *Carrier*, 226 N. Y. 114, upon which the taxpayer here also relies. (Pet. 12–13.) However, as is shown by *Osborn* v. *Bankers Trust Co.*, 168 Misc. (N. Y.) 392, the New York law with respect to powers rests upon a New York statute abrogating the common law, which statute requires that a reserved power of disposition be regarded as a power in trust and not as a beneficial power. The taxpayer has failed to establish that the law of Ohio, which is applicable to this case, is the same as the law of New York, or that there is any Ohio statute abrogating the common law rule with respect to powers, similar to the New York statute referred to in *Osborn* v. *Bankers Trust Co., supra.*

Nor is there conflict with *Shank* v. *Dewitt*, 44 Ohio St. 237. That case did not involve a power reserved to himself by the grantor of a trust. There, a testator in his will had given his wife a life estate in his property and authorized her to dispose of his property to his heirs as she thought best, and the court held that the widow, aside from her life estate, had only a power of appointment for the benefit of others, which she could not dispose of to her own benefit contrary to the intention of the testator. See also *Helfferich* v. *Helfferich, Jr.*, 11 Ohio Dec. 234, and 11 Ohio Dec. 303, 311. Clearly, such holdings have no bearing upon the question in this case as to the right of the

grantor of a trust to use his reserved powers for his own benefit.

CONCLUSION

The decision below is correct. It turns upon the particular facts of the case and presents no question calling for further review by this Court. There is no conflict of decisions. The petition should therefore be denied.

Respectfully submitted,

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JANUARY 1947.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) [As amended by Sections 1 and 3 of Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing) of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U. S. C. 22.)

SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, then the income of such part of the trust shall be included in computing the net income of the grantor.

(26 U. S. C. 166.)

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income be distributed to the grantor; * * *

* * * * *

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question."

(26 U. S. C. 167.)

Revenue Act of 1943, c. 63, 58 Stat. 21:

SEC. 134. TRUSTS FOR MAINTENANCE OR SUPPORT OF CERTAIN BENEFICIARIES.

(a) *Income for Benefit of Grantor.*—Section 167 (relating to income for benefit of

grantor) is amended by adding at the end thereof the following subsection:

"(c) Income of a trust shall not be considered taxable to the grantor under subsection (a) or any other provision of this chapter merely because such income, in the discretion of another person, the trustee, or the grantor acting as trustee or cotrustee, may be applied or distributed for the support or maintenance of a beneficiary whom the grantor is legally obligated to support or maintain, except to the extent that such income is so applied or distributed. In cases where the amounts so applied or distributed are paid out of corpus or out of other than income for the taxable year, such amounts shall be considered paid out of income to the extent of the income of the trust for such taxable year which is not paid, credited, or to be distributed under section 162 and which is not otherwise taxable to the grantor."

(b) *Taxable Years to Which Applicable.*—

(1) *General Rule.*—Except as provided in paragraph (2), the amendments made by subsection (a) shall be applicable with respect to taxable years beginning after December 31, 1942, unless a taxable year of the trust beginning in 1942 ends within a taxable year of the grantor beginning in 1943, in which case, except as provided in paragraph (2), such amendments shall not be applicable to such taxable years of the grantor.

(2) *Retroactive Effect.*—The amendments made by subsection (a) shall also be applicable with respect to all taxable years to which such amendments are not made applicable under paragraph (1), in the same manner

as if such amendments had been a part of the revenue laws applicable to such taxable years, but only if there are filed with the Commissioner (in accordance with regulations prescribed by him with the approval of the Secretary) at such time and by such persons as may be prescribed under such regulations, signed consents that there shall be paid, at such time as the Commissioner may prescribe, all of the taxes under Chapter 1 of the Internal Revenue Code or under the corresponding provisions of prior revenue laws which would have been paid for the taxable years concerned if such amendments had been a part of the revenue laws applicable to such taxable years.

(26 U. S. C., Supp. V, 167.)

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